

DEPARTMENT OF STATE REVENUE

04-20180729.LOF
04-20180730.LOF**Letter of Findings: 04-20180729; 04-20180730**
Gross Retail Sales Tax
For the Years 2014 through 2016

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Combination Gas Station/Convenience Store failed to meet its burden of establishing that the Department's proposed assessment of additional sales tax was wrong; in the absence of source sales documentation, its alternative calculation of underreported sales was insufficient to establish that the audit assessment was incorrect.

ISSUE**I. Gross Retail Sales - Assessment.**

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2-5-4-1; IC § 6-2.5-5 *et seq.*; IC § 6-8.1-3-12; IC § 6-8.1-5-1; IC § 6-8.1-5-4; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that the Department's sales tax audit overstated the amount of its convenience store taxable sales and that the assessment of additional tax is unjustified.

STATEMENT OF FACTS

Taxpayer operates two combination gas station and convenience store locations in Indiana. Taxpayer's convenience stores sell grocery items, tobacco products, pet food, fountain soft drinks, coffee, bottled drinks, candy, automotive supplies, alcoholic beverages, and the like.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns for its taxable store sales, taxable diesel sales, and use tax for tax years 2014, 2015, and 2016. The audit resulted in an assessment of additional sales and use tax.

Taxpayer does not dispute the audit findings for the taxable diesel sales and use tax, but does protest the findings for taxable store sales. Taxpayer argues that the amount assessed is overstated. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Finding results.

I. Gross Retail Sales - Assessment.**DISCUSSION**

Pursuant to the audit, the Department assessed additional sales tax on goods sold inside Taxpayer's store that were not exempt. Taxpayer, to the contrary, argues that the audit overstated the amount of non-exempt convenience store sales. Taxpayer asserts that the average percentage of nontaxable sales utilized by the auditor is inflated due to the addition of beer and wine sales in early 2015 and a reduction in nontaxable items that occurred around the same time.

As a threshold issue, it is the Taxpayer's responsibility to establish that the tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person

against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC §§ 6-2.5-5 *et seq.* Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2.5-4-1. A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

It should be pointed out that, "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." IC § 6-8.1-5-4(c).

The Department relied on an examination of the taxable versus non-taxable sales for May 2015 through December 2016, which was the time period which represented corrected computer data as the result of a prior audit of commonly owned gas station/convenience stores. The previous audit identified certain taxable store merchandise that was incorrectly coded in the computer system as non-taxable merchandise. Because all stores involved in the previous audit and the current audit utilize the same computer system, Taxpayer stated that it corrected these errors in mid-2015 in all stores commonly owned and operated by Taxpayer's sole shareholder. Taxpayer signed a projection agreement consenting to this sampling method in accordance with IC § 6-8.1-3-12(b), which states:

The department may audit any returns with respect to the listed taxes using statistical sampling. If the taxpayer and the department agree to a sampling method to be used, the sampling method is binding on the taxpayer and the department in determining the total amount of additional tax due or amounts to be refunded.

In support of its argument that the amount of tax was overstated, Taxpayer has provided financial statements from the general ledger for 2014 through 2016 for both locations. From this data, Taxpayer purportedly extrapolated the increase in beer and wine sales, which began after early-2015. Based upon this recalculation, Taxpayer provided alternative calculations of what it believed the rate of taxable sales should be. Taxpayer claims that "significantly more space" in existing coolers was used to hold beer and wine, which resulted in increased sales. Taxpayer also claims that there was a "significant increase" in cigarette and packaged beverage sales. As a result, Taxpayer argues that the percentage of non-taxable sales as a percentage of total sales would be a much smaller percentage for the months reviewed during the audit.

However, Taxpayer's representative operates under the same handicap as that faced by the Department's audit; there is a complete absence of source documentation necessary to verify that Taxpayer's recalculations are correct and the Department's audit was wrong. No source data was provided to support what was reported on the financial statements, and by extension, the difference in the beer and wine, cigarette, and packaged beverage sales from the sampled period to the rest of the audit period. In the absence of verifiable, accurate sales records, the Department is left to rely upon the projection methods utilized in the audit.

In short, Taxpayer and the Department agreed to the projection. Pursuant to IC § 6-8.1-3-12, the projection is binding. Without the verifiable source documents, Department does not agree that Taxpayer has met its burden under IC § 6-8.1-5-1(c) of establishing that the proposed assessment is wrong. Taxpayer has presented an alternative calculation representing what Taxpayer itself recognizes was an under-reporting of taxable convenience store sales but its alternative calculation does not establish that the audit assessment was wrong.

FINDING

Taxpayer's protest is respectfully denied.

June 29, 2018

Posted: 08/29/2018 by Legislative Services Agency
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